Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

3 July 2019 *

(Civil service – Staff of the EIB – Organisation of departments – Dispensation from service – Access to email and IT connections – Pre-litigation procedure – Admissibility – Legal certainty – Right to be heard – Presumption of innocence – Final report of OLAF – Obligation to state reasons – Liability – Material harm – Non-material harm)

In Case T-573/16,

PT, a member of staff of the European Investment Bank, represented by E. Nordh, lawyer,

applicant,

v

European Investment Bank (EIB), represented initially by G. Nuvoli, E. Raimond, T. Gilliams and G. Faedo, and subsequently by G. Faedo and M. Loizou, acting as Agents, assisted by M. Johansson and B. Wägenbaur, lawyers, and J. Currall, Barrister,

defendant,

APPLICATION under Article 270 TFEU and Article 50a of the Statute of the Court of Justice of the European Union seeking, first, annulment of the EIB's decisions of 13 April, 12 May, 16 June and 20 October 2015, 6 June 2016 and 7 February 2017 on the applicant's dispensation from service, of the EIB's decision of 18 June 2015 to block the applicant's access to his email and to IT connections of the EIB, and of the EIB's decisions not to forward to the applicant his salary slips and to remove his name from the organisation chart published on the EIB's intranet site, and, secondly, compensation for the harm which the applicant claims to have suffered,

THE GENERAL COURT (Fourth Chamber),

composed of H. Kanninen (Rapporteur), President, J. Schwarcz and C. Iliopoulos, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 23 January 2018,

gives the following

* Language of the case: Swedish.

Judgment [1]

…

III. Law

…

D. Substance

1. Claims for annulment

…

(a) First part of the first plea in law: breach of the principle of legal certainty

…

(2) Merits of the first part of the first plea in law

233 It must be noted that legal certainty, an integral part of which is the principle of foreseeability (see, to that effect, judgment of 11 May 2017, *Deza* v *ECHA*, T-115/15, EU:T:2017:329, paragraph 135 and the case-law cited), is a general principle of EU law. That principle seeks to ensure that situations and legal relationships arising under EU law remain foreseeable (see judgment of 4 May 2016, *Andres and Others* v *ECB*, T-129/14 P, EU:T:2016:267, paragraph 35 and the case-law cited) and requires that all measures of the administration which have legal effects must be clear and precise so that the parties concerned may be able to ascertain unequivocally what their rights and obligations are and to take steps accordingly (see, to that effect, judgment of 27 January 2016, *DF* v *Commission*, T-782/14 P, EU:T:2016:29, paragraph 45 and the case-law cited). That requirement applies in particular where the measure at issue may have adverse effects on the parties concerned (see, to that effect, judgment of 11 May 2017, *Deza* v *ECHA*, T-115/15, EU:T:2017:329, paragraph 135).

234 Thus, as a result of the principle of legal certainty, the binding nature of any measure intended to have legal effects must be derived from a provision of EU law which must be expressly indicated therein as its legal basis (see, to that effect, judgment of 11 May 2017, *Deza* v *ECHA*, T-115/15, EU:T:2017:329, paragraph 135 and the case-law cited). That requirement also applies to the obligation to state reasons (see, to that effect, judgment of 1 October 2009, *Commission* v *Council*, C-370/07, EU:C:2009:590, paragraph 55).

235 It is true that failure to refer to a specific provision need not necessarily constitute an infringement of essential procedural requirements if the legal basis for a measure may be determined from other parts of the measure. An explicit reference is, however, indispensable where, in its absence, the parties concerned and the EU Courts are left uncertain as to the specific legal basis for that measure (judgment of 14 June 2016, *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:434, paragraph 48).

1 Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

236 Furthermore, the principle of legal certainty requires that the consequences of the measure at issue must be foreseeable (see, to that effect, judgment of 12 June 2015, *Health Food Manufacturers' Association and Others* v *Commission*, T-296/12, EU:T:2015:375, paragraph 86).

237 However, the scope of the notion of foreseeability depends to a considerable degree on the content of the measure at issue, the field that it covers and the status of those to whom it is addressed. In particular, a measure may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which that measure may entail (see, to that effect and by analogy, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 219).

238 In the present case, it must be pointed out, as the applicant does, that the concept of dispensation from service does not have any express basis in either the 2009 Staff Regulations or any other provision of EU law. It is not apparent from the documents before the Court that recourse to measures such as the applicant's dispensation from service is a common, or even known, practice within the EIB in particular and the EU institutions in general. Moreover, at the meetings of 13 March and 15 June 2015, express reference was made to the 'special' nature of the applicant's dispensation from service.

239 Neither the decision of 13 April 2015 nor that of 12 May 2015 sets out the legal basis which the EIB intended to use in order to justify the applicant's dispensation from service. Those decisions, which are particularly terse, do not refer to any legal provision or contain any information which might have enabled the applicant to identify such a legal basis. In the decision of 13 April 2015, the EIB merely refers to the 'situation at [the applicant's] workplace', to the investigation of the Inspectorate General and to the interests of the service and of the applicant, and states, without providing any further details, that it has been decided to grant the applicant 'a temporary release from performing [his] duties' and that his rights under the Staff Regulations remain unchanged. The decision of 12 May 2015 is briefer still, inasmuch as it merely refers to the ongoing investigation, the well-being of the applicant and of his managers, and his possible reassignment.

240 Despite the absence of any reference to the legal basis for the applicant's dispensation from service in the decisions of 13 April and 12 May 2015, the EIB – over a period of several months – failed to reply to the applicant's requests for clarification in that regard, merely informing him, through the Director of the Operations and Employee Relations Department, that his dispensation from service did not amount to a suspension under Article 39 of the 2009 Staff Regulations. It is thus not disputed that the EIB, inter alia, failed to reply to an email of 13 March 2015 in which the applicant expressly called on it to 'refer to the legal basis of the decision' on his dispensation from service which the EIB intended to adopt (see paragraph 224 above). It was not until 16 June 2015, that is to say, after the expiry of the decisions of 13 April and 12 May 2015 and at the express request of the applicant's lawyers, that the EIB pointed to the broad discretion enjoyed by the administration in the organisation of its departments and to its duty of care as the basis for the applicant's dispensation from service.

241 In those circumstances, the applicant was unable, prior to 16 June 2015, despite his legal training and even by taking appropriate legal advice, to dispel the doubts which he had as to the legal basis for the decisions of 13 April and 12 May 2015. It must therefore be concluded that the EIB left the applicant in a situation of prolonged uncertainty as regards the scope of those decisions. Consequently, it was impossible for him to ascertain unequivocally what his rights and obligations were and to take steps accordingly.

242 That conclusion is all the more compelling because, as the applicant essentially points out, the interpretation that the EIB sought to give to the concept of dispensation (from service) and to the word 'release' (from his professional duties) in the decisions of 13 April and 12 May 2015 departs significantly from their ordinary meaning. The concept of 'dispensation' refers, in its ordinary meaning, to permission not to do what one is required to do. As for the word 'release', it refers, in its

ordinary meaning, to being relieved of something, to the fact that one is no longer bound to do what one is required to do. In the instant case, however, the EIB used the concept of dispensation and the word 'release' to describe a prohibition on doing what one is required to do. As the EIB expressly acknowledged at the hearing, the applicant 'c[ould] not work' by reason of his dispensation from service. The correspondence between the applicant and the EIB evidences that ambiguity. Thus, the applicant's reply to a work-related email on 15 April 2015 earned him a 'reminder' from the Director of the 'Financial Risk' Department of DG RM. However, the latter did not tell the applicant that he was prohibited from working, but only that he was 'officially off duty' and that he was not expected to work or reply to emails.

243 It follows that, in the absence of any identification of the legal basis used, the decisions of 13 April and 12 May 2015 are vitiated by a breach of the principle of legal certainty and a defective statement of reasons.

244 By contrast, the decisions of 16 June and 20 October 2015 identify, with clarity and precision, the legal basis underpinning them or, at the very least, contain information that makes it possible for the applicant to identify the legal basis unequivocally.

245 Thus, the decision of 16 June 2015 states, inter alia:

'In addition, with regard to the request for clarification of the legal basis for the dispensation formulated by your lawyers in the letter of 3 June 2015, please note that the EIB, as any other EU institution, enjoys large discretionary powers with regard to the organisation and management of its staff. These include the power to issue a dispensation from service, in particular, in accordance with the case-law, when its administration is faced with incidents incompatible with the good order and tranquillity of the service. The EIB is required to intervene with all the necessary vigour and respond with the rapidity and solicitude required by the circumstances of the case with a view to ascertaining the facts and, consequently, taking the appropriate action in full knowledge of the facts.

Accordingly, in such circumstances as in the case at hand, the [EIB], on the one hand, took the urgent interim administrative measures it deemed necessary to restore serene working conditions in accordance with requirements of good administration and duty of care. These measures were adopted with the diligence required from the [EIB] when treating cases concerning individuals.

On the other hand, the [EIB] has rapidly tried to establish the relevant facts with regard to the reported situations or accusations in order to decide further measures. Given the nature of the incidents in the present case, the [EIB] has proceeded with particular care.

…

The present confirmation of your dispensation is principally based on:

(a) strong interest of the service which requires [a] formal protective measure from the side of the [EIB] to tackle the situation at your workplace where the relationship between you and your management had become so intolerable that a normal functioning of the service was no longer possible. A restoration of the functioning of the division could no longer be achieved without a separation between you and your direct hierarchy;

(b) duty to take into account [the] interest of your management which had felt threatened by your behaviour and were not able to carry out their professional activities any more when you were present in the [EIB];

(c) duty to take into account your interests in the sense that the administration has an obligation not to expose you to the persons against whom you brought allegations.'

246 The decision of 20 October 2015 'confirms' the applicant's dispensation from service, states that the question of the legal basis used was resolved at an earlier juncture and provides the following clarification:

'The dispensation falls squarely into the competences of the [EIB]'s administration and, more particularly, within the President's prerogatives and competences to administer the [EIB]'s staff in his official capacity as Appointing Authority, under [Protocol (No 5) on the Statute of the EIB] and the EIB's Rules of Procedure (Article 23(3)).'

247 However, the mere fact that the decisions of 16 June and 20 October 2015 expressly identify, or make it easy for the applicant to identify, the legal basis used is not sufficient to conclude that they comply with the requirements of the principle of legal certainty. In accordance with the case-law cited in paragraphs 233, 234 and 236 above, the applicant would also have had to be in a position to assess with a sufficient degree of precision the scope, including the temporal scope, of those decisions and thus determine how long his dispensation from service was to last. That requirement was particularly important because an extended dispensation from service such as that to which the applicant was subject is not only equivalent to a decision to suspend a person from duty pursuant to Article 39 of the 2009 Staff Regulations, in so far as it deprives him of the opportunity to perform his duties (see, to that effect and by analogy, judgment of 16 December 2015, *DE* v *EMA*, F-135/14, EU:F:2015:152, paragraphs 39 and 40), but is also liable to have a significant adverse impact on his work, administrative and financial situation.

248 In the first place, an extended dispensation from service such as that to which the applicant was subject may adversely affect his rights under the Staff Regulations. In so far as he is prohibited from working, a member of the EIB's staff who, like the applicant, has been given a dispensation from service for an extended period cannot be properly appraised under Article 22 of the 2009 Staff Regulations or, consequently, be eligible for a promotion on the basis of merit under Article 23 thereof.

249 In the second place, an extended dispensation from service such as that to which the applicant was subject may adversely affect his pecuniary rights. That would be the situation even if, as in the present case, the salary of the person concerned was maintained throughout the period of his dispensation from service. It should be borne in mind that the remuneration of a member of staff of the EIB such as the applicant may include not only a salary, but also, inter alia, the annual allowances referred to in Annex II to the 2009 Staff Regulations. However, in so far as an extended dispensation from service such as that to which the applicant was subject prevents his performance from being appraised for an extended period (see paragraph 245 above), he is, in practice, deprived of the opportunity to receive such allowances. Since he is not entitled to promotion in such a case (see paragraph 248), either, he is also deprived of the opportunity to receive the salary increase which goes hand in hand with all promotions under Article 23 of the 2009 Staff Regulations.

250 In the third place, as no duties are assigned to a member of staff of the EIB who, like the applicant, is subject to an extended dispensation from service, he may, even though he retains his salary, plead detriment to his non-material interests (see, to that effect, judgment of 16 December 2015, *DE* v *EMA*, F-135/14, EU:F:2015:152, paragraph 42) and breach of the principle of correspondence between grade and post, under which the duties of an EU official or member of staff must not fall clearly short of those corresponding to his grade and post, taking account of their character, their importance and their scope (judgments of 23 March 1988, *Hecq* v *Commission*, 19/87, EU:C:1988:165, paragraph 7, and of 28 May 1998, *W* v *Commission*, T-78/96 and T-170/96, EU:T:1998:112, paragraph 104). Contrary to what the EIB maintains, the scope of that principle is in no way restricted to reassignment decisions (see, to that effect, judgment of 8 May 2008, *Kerstens* v *Commission*, F-119/06, EU:F:2008:54, paragraph 45).

251 However, unlike not only the decisions of 13 April and 12 March 2015, the duration of which was expressly limited to one month, but also a suspension decision pursuant to Article 39 of the 2009 Staff Regulations, the maximum duration of which is three months unless criminal proceedings have been brought, the decisions of 16 June and 20 October 2015 are not subject to any specific temporal limitation. It is true that those decisions refer to the temporary nature of the applicant's dispensation from service and essentially state that its duration is conditional upon the occurrence of a future event. However, the date of occurrence of such an event could not be ascertained with a sufficient degree of precision on the date of adoption of those decisions.

252 The decision of 16 June 2015 merely makes the end of the applicant's dispensation from service subject to the conclusion of the 'formal investigation' by OLAF. The concept of formal investigation does not appear in Regulation No 883/2013 or in Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by OLAF (OJ 1999 L 136, p. 1), which it repealed. It is apparent, however, from the minutes of the meeting of 15 June 2015 that, contrary to what the applicant suggests in his pleadings, that concept refers not to that of an 'administrative investigation' as defined in Article 2(4) of Regulation No 883/2013, but, in a generic way, to the procedure before OLAF, which concludes with the drawing-up of an investigation report. At that meeting, the Director of the Operations and Employee Relations Department of the EIB informed the applicant that it was intended to extend his dispensation from service until the OLAF report was available.

253 Similarly, the decision of 20 October 2015 merely makes the end of the applicant's dispensation from service subject to the completion of OLAF's 'work'. The concept of 'work' is not used in that way in Regulation No 883/2013 or in Regulation No 1073/1999, which it repealed. However, in the light of the considerations set out in paragraph 252 above, the applicant was able to ascertain that, as with the concept of formal investigation, the concept of work referred, in a generic way, to the procedure before OLAF, which concludes with the drawing-up of an investigation report.

254 It should be noted that Regulation No 883/2013 does not lay down a mandatory time limit within which OLAF's investigation report must be drawn up. It simply states, without further explanation, that OLAF's investigation report is to be drawn up 'on completion of' or 'following' the administrative investigation as defined in Article 2(4) of that regulation, the duration of which is also not subject to any mandatory time limit. Article 7(8) of Regulation No 883/2013 provides that, if such an investigation cannot be closed within 12 months after it has been opened, the Director-General of OLAF is required, at the expiry of that 12-month period and every 6 months thereafter, to report to the Supervisory Committee of OLAF, indicating the reasons why this has not been possible and the remedial measures envisaged with a view to speeding up the investigation.

255 The statements made by the Director of the Operations and Employee Relations Department of the EIB at the meeting of 15 June 2015, the purpose of which was to hear the applicant prior to the adoption of the decision of 16 June 2015, confirm just how difficult it was to predict with any precision or certainty an end date linked to the completion of the procedure before OLAF. During that meeting, the Director of the Operations and Employee Relations Department of the EIB informed the applicant that it was intended to extend his dispensation from service until the OLAF report was available and that 'it was hoped that this would still happen before the summer break, but no guarantee whatsoever could be given in that respect since the [EIB] had [no] control over the OLAF proceedings'.

256 In those circumstances, the applicant was unable to determine, with a sufficient degree of precision, the temporal scope of the decisions of 16 June and 20 October 2015. It was therefore impossible for him to ascertain unequivocally what his rights and obligations were and to take steps accordingly.

257 Consequently, the decisions of 16 June and 20 October 2015 are, like the decisions of 13 April and 12 May 2015, vitiated by a breach of the principle of legal certainty.

258 The EIB's argument that dispensation from service was the only conceivable means of bringing an end to the dispute between the applicant and his managers, since it was not possible to reassign him to another department or second him to another body, cannot call that conclusion into question. The broad discretion that the EIB claims to enjoy to organise its departments in keeping with the tasks entrusted to it and to assign the staff available to it in the light of such tasks is not unlimited. On the contrary, that discretion must be exercised in the interest of the service and in compliance with the principle of correspondence between grade and post (see judgment of 19 June 2015, *Z* v *Court of Justice*, T-88/13 P, EU:T:2015:393, paragraph 105 and the case-law cited), as well as the duty to have regard for the welfare of officials, the general principles of EU law and the fundamental rights of the person concerned (see, to that effect, judgments of 13 December 2017, *HQ* v *CPVO*, T-592/16, not published, EU:T:2017:897, paragraphs 26 and 27; of 2 May 2007, *Giraudy* v *Commission*, F-23/05, EU:F:2007:75, paragraph 141; and of 9 October 2007, *Bellantone* v *Court of Auditors*, F-85/06, EU:F:2007:171, paragraph 61). That discretion was therefore not of such a kind as to permit the administration to overstep the boundaries of the principle of legal certainty or the principle of correspondence between grade and post in order to remove the applicant from his occupational activity for an extended period, the duration of which could not be determined with precision, and with the significant adverse impact described in paragraphs 247 to 250 above.

259 If the EIB were of the view that the applicant's conduct amounted to grave misconduct liable to result in his summary dismissal, it ought to have initiated disciplinary proceedings against him and suspended him under Article 39 of the 2009 Staff Regulations. If, by contrast, the EIB considered, as it submitted at the hearing, that the applicant's conduct did not come within the scope of that provision, but that the continuance of its working relationship with him was inconceivable, it should have terminated his contract under Article 16 of the 2009 Staff Regulations, subject to compliance with the applicable rules.

260 The first part of the first plea in law must therefore be upheld and, in consequence, the decisions of 13 April, 12 May, 16 June and 20 October 2015 must be annulled.

…

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls the decisions of the European Investment Bank (EIB) of 13 April, 12 May, 16 June and 20 October 2015, 6 June 2016 and 7 February 2017 on PT's dispensation from service and the EIB's decision of 18 June 2015 to block PT's access to his email and to IT connections of the EIB;**

2. **Orders the EIB to pay to PT, in respect of the non-material harm suffered, the sum of EUR 25 000 plus default interest from the date of delivery of the present judgment, at the rate fixed by the European Central Bank (ECB) for main refinancing operations, increased by 3.5 points;**

3. **Dismisses the action as to the remainder;**

4. **Orders the EIB to pay the costs.**

Kanninen Schwarcz Iliopoulos

Delivered in open court in Luxembourg on 3 July 2019.

[Signatures]